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When Laundry Becomes Deadly: Why the Extension of Duty past Spouses in Schwartz v. Accuratus Corp. Holds the Right People Responsible for Take-Home Toxic Torts

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WHEN LAUNDRY BECOMES DEADLY: WHY THE EXTENSION OF DUTY PAST SPOUSES IN *SCHWARTZ v. ACCURATUS CORP.* HOLDS THE RIGHT PEOPLE RESPONSIBLE FOR TAKE-HOME TOXIC TORTS

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"[T]he evolution of case law must reflect the simultaneous evolution of societal values and public policy."[1]

I. The Silent Killer on Your Work Clothes: An Introduction to the Take-Home Toxic Tort Theory of Liability

The legal profession is no stranger to toxic tort theory liability.[2] Every jurisdiction has recognized a cause of action for a person who has been sufficiently exposed to harmful chemicals, such as asbestos or beryllium, and has developed a disease or passed away due to the exposure.[3] Toxic tort cases are so prevalent that "[a]sbestos litigation is the longest-running mass tort litigation in the United States."[4] Thousands of new cases are filed every year, and that number has stayed fairly consistent.[5] A large part

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1. Schwartz v. Accuratus Corp., 139 A.3d 84, 90 (N.J. 2016) (citing Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1121 (N.J. 1993)) (holding employer liable to employee's girlfriend and roommate under take-home toxic tort theory).

2. *See* Mark S. Dennison & Warren Freedman, *Handling Toxic Tort Litigation*, 57 Am. Jur. Trials 395 § 6, at 415–17 (1996) (discussing factual and legal background of toxic tort liability). The first toxic tort theory cases were filed in the 1970s. *See id.* § 5, at 414 (outlining history of toxic torts); Richard A. Solomon, *Clearing the Air: Resolving the Asbestos Personal Injury Litigation Crisis*, 2 Fordham Envtl. L. Rep. 125, 125–26 (1991) (outlining history of toxic torts). Since then, toxic torts have become a common claim. *See id.* (discussing rise of toxic torts).

3. *See* Dennison & Friedman, *supra* note 2, § 7, at 418 ("Most toxic tort cases are based on common law theories of liability because environmental statutes generally restrict the amount and type of recovery available to injured plaintiffs. Generally, the great various common law causes of action favor plaintiffs in their legal claims." (footnote omitted)).

4. *See* Rebecca Leah Levine, Note, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 Wash. L. Rev. 359, 359 (2011); *see also* Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008) (recognizing magnitude and prevalence of asbestos cases).

5. *See* KCIC, *Asbestos Litigation: 2015 Year in Review* 2 (2016), http://riskybusiness.kcic.com/wp-content/uploads/2016/02/Asbestos2015YearInReview-1.pdf [https://perma.cc/DY3Z-UZH6]. KCIC, a corporate risk management and risk analysis firm, estimated that there were 4,820 asbestos claims filed in 2014, and

of these toxic tort cases and the derivative focus of this Note involve exposure to these substances in the workplace.[6] What is already a complex theory of liability has grown even more complex in recent years as some courts have begun to recognize what is known as the "take-home toxic tort theory of liability."[7] At the heart of this theory is, believe it or not, clothing.[8]

The theory arises from the unfortunate fact that harmful substances are not just left at the workplace when employees leave.[9] Often, workers bring these chemicals home on their clothes, exposing their family members and roommates to harmful substances, as well.[10] These third parties are exposed to harmful chemicals if they do laundry and shake out the clothes, if they come into physical contact with the person wearing the clothes, or if they are exposed to chemicals from the clothes through particles in the air.[11] The complexity of the theory centers on whether or not a third party that develops a disease from this take-home exposure has a cause of action against the employers, manufacturers, and premises owners of the worker or place of work; more specifically, the issue is whether or not these defendants owe a duty of care to third parties who come into contact with harmful substances that workers bring home.[12]

4,465 filed in 2015. *See id.* (presenting statistics from 2014 and 2015 in bar graph). KCIC "estimate[s] that [their database] captures at least 90% of the total asbestos filings in the [United States]." *Id.* (describing accuracy of statistics).

6. *See* W. Kip Viscusi, *Compensating Workplace Toxic Torts*, 37 PROC. ACAD. POL. SCI. 126, 126–27 (1988). Viscusi explains the novelty of the problem of occupational diseases as compared to occupational injuries:

> Approximately 162,000 occupational illnesses are documented annually by the U.S. Bureau of Labor Statistics. This figure probably understates the prevalence of occupational disease, however, since other Department of Labor statistics indicate that some 2 million people are severely or partially disabled by occupational diseases, of whom 700,000 suffer long-term total disability.

Id.

7. *See generally* James T. O'Reilly, *How Have Courts Decided "Take-Home" Asbestos Exposure Claims?*, 1 TOXIC TORTS PRAC. GUIDE § 5:4 (2016) (explaining complexity of toxic tort theory cases).

8. For an explanation of how clothes expose individuals to toxic substances, see *infra* notes 10–11 and accompanying text.

9. *See* O'Reilly, *supra* note 7, at § 5:4 (explaining that harmful substances can move from workplace to home).

10. *See id.* (highlighting dangers of take-home toxic exposure).

11. *See id.* (noting several different names for this type of exposure, such as "bystander, household, para-occupational, peripheral, secondhand, take-home, and transmission asbestos exposure" (footnotes omitted)).

12. *See* Levine, *supra* note 4, at 364–65, 376 (discussing how individuals are "indirectly exposed" to toxic chemicals, novelty of take-home asbestos exposure claims, and how courts have begun to analyze them). In determining take-home exposure claims:

> The key factor that influences whether a court permits a take-home exposure claim is the methodology used to analyze negligence. Jurisdictions that tend to permit such claims begin their analyses by focusing on whether the harm to the plaintiff was a foreseeable consequence of the

Furthermore, there is a question as to how far the duty should extend if courts do find a duty to third parties.[13] Should the duty extend only to spouses and members of the immediate family, or should it extend further to include roommates and everyone living in the household?[14] What about to people who merely visit the home, or to *anyone* the worker comes into contact with after work?[15]

Some courts have decided, for a variety of different reasons, that there is no liability toward anyone other than the employee.[16] Others, basing their decisions on concepts of foreseeability and public policy, have extended liability to spouses or family members.[17] Recently, in *Schwartz v. Accuratus Corp.*,[18] the New Jersey Supreme Court was the first jurisdiction to extend duty past partners and members of the immediate family to in-

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> employer's actions. In contrast, jurisdictions that tend not to uphold such claims focus on the relationship between the employer and the plaintiff.

Id. at 360–61 (footnotes omitted) (citing Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 361 (Tenn. 2008)).

13. *See id.* at 376–83 (describing different approaches taken by courts considering extent of employer duty to third parties injured by take-home toxic exposure).

14. For a discussion of the case *Schwartz v. Accuratus Corp.*, in which this question was answered, see *infra* notes 91–105.

15. *See* Schwartz v. Accuratus Corp., 139 A.3d 84, 91 (N.J. 2016) ("We note that no precedent from another jurisdiction, in a non-strict liability setting, has found a duty in a take-home toxic tort cause of action outside of a factual setting involving household members, presumably because of the idiosyncratic nature of most other interactions with a take-home toxin." (citing Zimko v. Am. Cyanamid, 905 So. 2d 465, 483 (La. Ct. App. 2005); *Satterfield*, 266 S.W.3d at 374–75)).

16. *See* Riedel v. ICI Americas Inc., 968 A.2d 17, 26 (Del. 2009) (finding employer did not owe duty to employee's wife who developed asbestosis due to take-home exposure). In *Riedel*, an employee's wife brought a claim against her husband's employer after contracting asbestosis. *See id.* at 19. The wife alleged the employer "failed to prevent her husband from taking asbestos home on his clothing and failed to warn [them] of the dangers of asbestos exposure." *See id.* at 18 (discussing plaintiff's claim). The Delaware Supreme Court concluded there was no "legally significant relationship" between the wife and the employer, and therefore, the employer owed no duty to the wife. *See id.* at 25; *see also* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (finding no duty because it was not reasonably foreseeable to employer that asbestos particles on worker's clothes would cause harm to worker's children forty years later), *abrogation recognized by In re* Abestos Litig., C.A. No. N14C-01-287 ASB, 2017 WL 465301 (Del. Super. Feb. 2, 2017). The *Martin* court explained, "These state court decisions do not reach a uniform result, but we find the cases declining to find a duty to be more persuasive . . . . Accordingly, we find that defendants did not owe a duty to [the employee]." *Id.* at 446 (discussing holding).

17. *See, e.g.*, *Satterfield*, 266 S.W.3d at 375 (stating that, based on facts in plaintiff's complaint, employer may have owed duty to employee's daughter injured by take-home asbestos exposure). The plaintiff in *Satterfield*, the daughter of an employee, was exposed to asbestos-contaminated work clothes from the day she was born, and she died of mesothelioma at age 25. *See id.* at 351–53.

18. 139 A.3d 84 (N.J. 2016).

clude roommates and other unrelated members of the household.[19] This Note agrees with the decision in *Schwartz* that take-home toxic tort liability and the legal duty of employers should be extended to third parties, including family members, roommates, and other household members.[20] This Note further argues that other courts should adopt this approach because the dangers are foreseeable and employers and manufacturers are in the best position to pay the costs of preventing the associated harm and of damages.[21]

The Note consists of seven parts. Part II describes the issues in proving toxic tort liability and how courts have decided issues in take-home toxic tort theory liability cases.[22] Part III details the applicable case law that led to the New Jersey Supreme Court's recent decision in this area.[23] Part IV details the facts and procedural history of *Schwartz v. Accuratus Corp.*[24] Part V examines the reasoning behind the New Jersey Supreme Court's decision to extend duty and liability to unrelated third parties.[25] Part VI discusses the relevant policy considerations both in favor of and against the extension of duty in take-home toxic tort theory cases and explains why the decision in *Schwartz* highlights notions of fairness and supports the public interest.[26] Part VII focuses on the impact of the New Jersey Supreme Court's decision and discusses where this area of law is headed.[27]

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19. *See id.* at 90–91 (holding duty recognized in prior case law not intended to stay static and prior case law did not suggest that duty *cannot* extend beyond spouses).

20. For a further discussion on the necessity of extending a legal duty to third parties, see *infra* notes 136–45 and accompanying text.

21. For a further discussion of why the dangers are foreseeable and why employers and landowners are in the best position to pay to prevent the associated harm and pay for damages caused, see *infra* notes 112–30 and accompanying text.

22. For a further discussion of the prior case law of the take-home toxic tort theory of liability and how courts have decided on the important issues in litigation, see *infra* notes 28–51 and accompanying text.

23. For a thorough discussion of the New Jersey Supreme Court's decision in *Olivo v. Owens-Illinois, Inc.*, the case leading up to *Schwartz*, see *infra* notes 52–72 and accompanying text.

24. For further discussion of the facts and procedural history of *Schwartz*, see *infra* notes 73–88 and accompanying text.

25. For further discussion of the reasoning behind the New Jersey Supreme Court's decision to extend duty and liability to unrelated third parties, see *infra* notes 89–105 and accompanying text.

26. For further discussion of the considerations both in favor of and against extending duty in take-home toxic tort litigation, see *infra* notes 106–34 and accompanying text.

27. For further discussion of the impact of *Schwartz*, see *infra* notes 135–45 and accompanying text.

II. ESTABLISHING DUTY AND CAUSATION: THE BACKGROUND OF PROVING AND ANALYZING TOXIC TORT CLAIMS

Proving liability in toxic tort theory cases can be difficult.[28] In order to show a defendant is liable, a plaintiff first needs to show the defendant actually caused the injury and that the defendant breached a duty of care in doing so.[29] The following paragraphs outline the issues in toxic tort theory litigation and how courts have handled them.[30]

A. *Shaking out the Basics: What Is Toxic Tort Theory Liability?*

Generally, "[t]oxic torts arise from wrongful actions or omissions that present unreasonable risks to human health and the environment."[31] In toxic tort litigation, a person, or family member on behalf of a person, alleges that a substantial amount of exposure to a harmful substance has caused serious harm, sickness, or even death.[32] Further, "toxic torts generally involve varied injuries and diseases that can occur unexpectedly and recurrently, and which are usually alleged to have been caused by exposure to toxic substances, liquids, gases, vapors, particulates, or dust, which may be unidentifiable or even latent for long periods of time."[33] Toxic tort claims are usually based upon theories of negligence or strict liability, but they can encompass a number of other claims, as well.[34]

Toxic tort litigation presents many complex problems with which courts still struggle today.[35] One of the biggest issues within toxic tort

28. *See* RHON E. JONES & MARK ENGLEHART, LITIGATING TOXIC TORTS 1 (2007), http://www.beasleyallen.com/webfiles/Litigating%20Toxic%20Torts.pdf [https://perma.cc/BJ9E-H5ZY] (explaining that litigating toxic tort cases "can be intimidating" due to issues in development and identification of injury and proof of causation).

29. *See id.* at 2 (explaining that "[a] successful toxic tort plaintiff must establish legal and medical causation" (citing Christopher Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L.J. 605 (1991))).

30. For a further discussion of issues in toxic tort litigation and how courts have previously handled them, see *infra* notes 31–51 and accompanying text.

31. Dennison & Freedman, *supra* note 2, at § 4, at 414 (defining "toxic torts").

32. *See id.* (providing examples of toxic torts).

33. *Id.* (discussing typical causes of injuries in toxic tort cases).

34. *See id.* at § 1, at 410 (explaining that plaintiff generally has to prove: (1) "[p]laintiff was exposed to a disease-causing agent or substance"; (2) "[d]efendant is legally responsible for plaintiff's exposure to the . . . substance"; (3) "[p]laintiff has suffered or is currently suffering from exposure"; and (4) that exposure was proximate cause of plaintiff's injury); *see id.* at §§ 7–18, at 418–34 (discussing various grounds and theories of toxic tort liability, including trespass, nuisance, negligence, emotional distress, fear of future disease, strict products liability, misrepresentation and fraud, and failure to warn).

35. *See* Stephen Blacklocks & Michael Kruse, *Proof of Causation in Recent Product Liability Cases*, LAW360 (Apr. 30, 2008), https://www.hunton.com/files/Publication/028884d3-fc53-4773-88b8-83c8885e0197/Presentation/PublicationAttachment/2c9a4650-f252-4e1f-8370-3a83771688f1/Proof_Of_Causation.pdf [https://perma.cc/V9BH-R7LL] (stating "courts are still grappling with what each step [of proving toxic tort liability] demands of a plaintiff").

litigation is proof of causation, both factual and proximate.[36] With respect to proximate causation, toxic tort injuries or diseases often lay dormant or undiagnosed for many years, and it can be difficult to trace the origin of the injury.[37] Moreover, one commentator has noted that in cases where a plaintiff has a disease that can stem from a variety of causes, it can be difficult for the plaintiff to prove that the exposure to the harmful substance was the factual and only possible cause of the disease or injury.[38] Plaintiffs who cannot prove that the disease or injury was the direct result of the exposure to the harmful substance cannot succeed on a negligence claim.[39] For these reasons, courts struggle with balancing relief for the plaintiff with acting fairly towards the defendant in toxic tort litigation.[40]

36. *See id.* (discussing issues with causation). Plaintiffs must prove both general causation—that the substance *could* cause the plaintiff's injury or disease—and specific causation—that it was the "exposure to the toxin did in fact cause [the plaintiff's] injury." *See id.* (discussing difference between general and specific causation). For a further discussion of proof of causation in a toxic tort case, see Andrews v. U.S. Steel Corp., 250 P.3d 887, 890 (N.M. Ct. App. 2011) (citing Norris v. Baxter Healthcare Corp., 397 F.3d 878, 881 (10th Cir. 2005)) (stating "evidence must show both 'general causation' and 'specific causation'" to succeed in toxic tort cases).

37. *See* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 973 (1988) (acknowledging "lengthy latency periods from exposure [to toxic substances] to clinical manifestations of disease").

38. *See* Viscusi, *supra* note 6, at 126–27 (discussing factors that complicate efforts to understand scope of occupation disease problem).

> Although there are some "signature" diseases, such as mesothelioma, whose relationship to a particular kind of exposure is well established, most chronic illnesses can be caused by exposure to any of several substances or by participation in any of several activities. Lung cancer, for example, may result from air pollution, cigarette smoke, asbestos, or many other carcinogens. Thus it may be quite difficult to disentangle the occupational contribution to someone's disease.

Id. at 127.

39. *See* JONES & ENGLEHART, *supra* note 28, at 2. (explaining "[p]laintiff's exposure and subsequent disease must be causally related and not simply a coincidence" (citing Andrew A. Marino & Lawrence E. Marino, *The Scientific Basis of Causality*, 21 U. DAYTON L. REV. 1 (1995))). "[The] plaintiff must offer proof that the exposure to the toxin was a substantial factor in causing . . . [the] disease." *Id.*; *see also* Johnson v. Arkema, Inc., 685 F.3d 452, 457–58 (5th Cir. 2012) (per curiam) (affirming grant of summary judgment for employers because plaintiff "was unable to prove causation"). In *Johnson*, an employee filed a personal injury suit against his employer after developing "severe restrictive lung disease and pulmonary fibrosis." *See id.* at 457. At the glass bottling plant, the employee was exposed to "a chemical known as Certincoat," which "is composed mostly of monobutyltin trichloride." *See id.* Although the plaintiff provided expert testimony regarding a link between the chemicals he was exposed to and restrictive lung disease, he had insufficient evidence to prove specific causation or that the exposure was sufficient to be the specific and sole cause of the illness. *See id.* at 472 (discussing problems with plaintiff's argument).

40. *See* Yelena Kotlarsky, Note, *The "Peripheral Plaintiff": Duty Determinations in Take-Home Asbestos Cases*, 81 FORDHAM L. REV. 451, 456–57 (2012) (stating after defendant is determined to be cause of injury, "it must still [be] determine[d] whether the defendant should be held responsible for that harm" (citing WILLIAM

B. *Foreseeability Is Key: How Courts Have Decided Take-Home Toxic Tort Cases*

In order for a defendant to be liable to a plaintiff, it must first owe a duty of care to the plaintiff.[41] Analyzing whether there is a duty of care has been the main source of conflict among state courts in regard to the take-home toxic tort theory of litigation.[42] Cases examining duty in take-home toxic tort claims often fall into three distinct classes: "(1) cases that focus on the foreseeability of the injury; (2) cases that focus on the legal relationship, or the lack of one, between the parties; and (3) cases that focus on the situs of the exposure, that is, whether the exposure occurred on the defendant's premises."[43]

Where courts have used the foreseeability of harm as the principal consideration in duty analysis, they have generally found a duty of care to third parties.[44] When considering foreseeability, courts generally find that

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L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 244 (4th ed. 1971); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 103–09 (Dennis Patterson ed., 2010))).

41. *See* Dennison & Freedman, *supra* note 2, at § 11, at 422–24 (discussing background of toxic tort liability and elements of negligence).

42. *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 372 (Tenn. 2009) (discussing "split of authority" throughout country on issue of whether employers have duty to third parties exposed to take-home asbestos). Courts have acknowledged there is a divide among state courts: "Courts across the country have disagreed as to how these broad principles of tort law should be used to determine whether an employer owes a duty to persons who develop asbestos-related illnesses after exposure to asbestos fibers on its employees' clothing." *Id.* at 361 (noting split between courts on issue of take-home toxic tort liability).

43. David M. Melancon, *Airing Asbestos Litigation's Dirty Laundry: "Take-Home" Asbestos Exposure and the Ongoing Efforts to Determine the Scope of the Duty of Premises Owners and Employers*, FOR DEF., Apr. 2016, at 48–49 (analyzing duty in toxic tort liability cases). These three categories encompass the majority of take-home toxic tort liability analyses. *See id.* (discussing three "primary" approaches taken by courts analyzing duty in take-home asbestos exposure cases). For examples of cases in the first category, see *infra* notes 127–28. For examples of cases in the second category, see *infra* note 49. For examples of cases in the third category, see *infra* note 133.

44. *See* Simpkins v. CSX Corp., 929 N.E.2d 1257 (Ill. App. Ct. 2010) (holding employer has duty to protect employees' wives from exposure), *aff'd sub nom* Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092 (2012). In *Simpkins*, the plaintiff, a railroad worker's wife, contracted mesothelioma after being "exposed to asbestos fibers brought home on the work clothes of her husband" and eventually died of mesothelioma cancer. *See id.* at 1258. The court found that "every person owes every other person the duty to use ordinary care to prevent any injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions." *Id.* at 1261–62 (citing Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 238 (Ill. 2007)) (discussing universal duty of care). The court found it was "foreseeable that the wife of an asbestos-exposed worker would also be exposed to asbestos dust through washing his clothing," and therefore, the employer owes a duty to a worker's wife. *See id.* at 1265–66 (holding employer liable). Furthermore, the court reasoned that the employer could have reduced the risk of exposure by "providing warnings . . . [and] safety instructions," or "substituting [safer] products," and that the burden of taking such precautions was not higher than the risk of

as a matter of public policy, if employers know of the harmful substances and do not take proper preventative precautions, it is foreseeable that the employees will wear the clothes home and possibly expose household members to the harmful substances.[45] On the other hand, there are courts that have conducted a foreseeability analysis and have determined that it is, in fact, not foreseeable that exposure to chemicals at work would harm household members.[46] Consequently, these courts have not found employers, manufacturers, or premises owners liable to third party household members.[47] One of the main reasons courts have not found the danger foreseeable is that, due to the amount of time in between the exposure and the injury, the plaintiff is often unable to prove that the "employer[ ]

injury. *See id.* at 1265 (implying employers are in best position to take preventative measures).

45. *See* Zimko v. Am. Cyanamid Co., 905 So.2d 465, 483, 493 (La. Ct. App. 2005) (finding "general duty to act reasonably in view of the foreseeable risks of danger to household members of [ ] employees resulting from exposure to asbestos fibers carried home on [an] employee's clothing, person, or personal effects"); *see also* Rochon v. Saberhagen Holdings, Inc., No. 58579-7-1, 2007 WL 2325214, at *1–2, *4 (Wash. Ct. App. Aug. 13, 2007) (holding employer has duty not to cause unreasonable risk of harm and that "[e]mployers generally owe their employees a duty to provide a reasonably safe work environment").

Another case in which a court found a duty to take preventative action is *Chaisson v. Avondale Industries, Inc.* *See* Chaisson v. Avondale Indus., Inc., 947 So.2d 171 (La. Ct. App. 2006). The plaintiffs were a pipefitter and his daughters, and the defendant was the pipefitter's former employer. *See id.* at 176–77. The court stated that in analyzing duty:

> The court may take "various moral, social, and economic factors" into account when determining whether to impose a duty. These factors include: 1) "the fairness of imposing liability;" 2) "the economic impact on the defendant and on similarly situated parties;" 3) "the need for an incentive to prevent future harm;" 4) "the nature of defendant's activity;" 5) "the potential for an unmanageable flow of litigation;" 6) "the historical development of precedent;" and 7) "the direction in which society and its institutions are evolving."

Id. at 181 (citations omitted) (quoting Fox v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 576 So.2d 978, 981 (La. 1991)) (illustrating factors courts should take into consideration when analyzing duty).

46. *See* Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844, 846 (10th Cir. 1992) (holding that employer could not foresee that wife of insulator who worked with asbestos products would purchase or use clothes); *see also* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (concluding that employer could not reasonably foresee danger presented by clothes), *abrogation recognized by In re* Abestos Litig., C.A. No. N14C-01-287 ASB, 2017 WL 465301 (Del. Super. Feb. 2, 2017).

47. *See Martin*, 561 F.3d at 439, 447 (holding it was not forseeable to employer that employee's child might be exposed to harmful chemicals). In *Martin*, the Sixth Circuit held that, although foreseeability is an important factor in determining duty, foreseeability is "determined based on 'what the defendant knew at the time of the alleged negligence.'" *See id.* at 444 (quoting Pathways, Inc. v. Hammons, 113 S.W.3d 85, 90 (Ky. 2003)) (finding defendant not liable). Noting the exposure happened before the risks of asbestos to bystanders were widely known, the court found that the harm was not foreseeable "because [the defendants] neither knew [nor] should have known of the danger" of harm posed by asbestos transported on clothes. *See id.* at 446–47 & n.3.

generally knew of the dangers of [toxic] exposure to nonemployees" at the time of exposure.[48]

On the other hand, some state courts focus on the legal relationship between the employer or landowner and the household member to determine whether there is a duty; courts that followed this path of duty analysis have generally found no duty, and therefore no liability.[49] The third category analyzes duty based on whether the exposure took place on the premises.[50] The state courts that have adopted this duty analysis have rejected take-home liability by reasoning that employers or landowners should be responsible for or owe a duty only to those who are exposed to substances on the employers' or landowners' premises.[51]

III. THE SET-UP FOR *SCHWARTZ*: THE NEW JERSEY SUPREME COURT'S EXTENSION OF DUTY TO SPOUSES IN *OLIVO V. OWENS-ILLINOIS, INC.*

The New Jersey Supreme Court's decision in *Schwartz* was essentially an expansion of a case the same court decided in 2006, *Olivo v. Owens-*

48. *See* Melancon, *supra* note 43, at 54. (explaining why some courts have not found harm to be foreseeable).

49. *See* Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 1044 (Ill. Ct. App. 2009) (finding lack of "special relationship" between defendant and plaintiff, and therefore finding defendant owed no duty to plaintiff); *see also* Ford Motor Co. v. Miller, 260 S.W.3d 515, 516 (Tex. App. 2008) (holding "Ford owed no duty to [plaintiff]").

In *Ford*, a worker brought an action against the owner of the premises where he worked after his step-daughter died from mesothelioma. *See id.* at 516. "Roland's job was to repair, tear out, and rebuild blast furnaces." *Id.* The plaintiff "wore no protective clothing at work and did not shower or change clothes before going home." *Id.* Further, Roland's daughter helped wash Roland's clothes. *See id.* Roland brought suit against the owner of the property, Ford. *See id.* The Michigan Supreme Court, ruling on a certified question from the Texas appellate court, held there was no legally significant relationship between Ford and Roland's step-daughter, and therefore a foreseeability analysis did not even need to be conducted. *See In re* Certified Question from the Fourteenth Dist. Ct. App., 740 N.W.2d 206, 222 (Mich. 2007) (illustrating importance of relationship to duty analysis).

50. *See* Dennison & Freedman, *supra* note 2, at § 22, at 435–36 (discussing different ways of analyzing toxic tort theory litigation).

51. *See* Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 453 (Ohio 2010) (holding that because exposure did not take place on premises, employer owed no duty to wife). In *Boley*, the wife of a Goodyear employee was exposed to asbestos while doing her husband's laundry after work. *See id.* at 449. The Ohio Supreme Court concluded that, pursuant to the applicable statute, there is no liability in take-home toxic tort cases if the "exposure [to the toxic substance] does not occur at the premises owner's property." *See id.* at 452 (limiting extension of duty in toxic tort cases). The court held that there is no duty of care unless the exposure takes place on the defendant's premises. *See id.* at 453 (holding that pursuant to statute, no duty of care was owed to employee's wife unless exposure occurred at owner's property).

Illinois, Inc.[52] The decision in *Olivo* was never one the court envisioned would remain static, nor was the duty of care to spouses that it recognized intended to be limited to spouses.[53] The following subsections will discuss the facts and holding of the case that led up to the New Jersey high court's most recent decision in take-home toxic tort theory litigation.[54]

A. *Explicating* Olivo*: The Facts and Procedure of the Case*

The plaintiff in *Olivo*, Anthony Olivo, "worked as a steamfitter [and] welder" for nearly forty years "at various industrial and commercial sites in New Jersey."[55] Due to the nature of his work, "Anthony worked around asbestos-containing materials" daily.[56] Moreover, "when Anthony came home from work each night[,] he would go to the basement where the family's washing machine was located, remove his work clothes, and change into clean clothing that Eleanor would leave there for him," and Eleanor, his wife, would wash the clothes each night.[57]

Unfortunately, as a result of the asbestos exposure, "Anthony was diagnosed with [a] non-malignant asbestos-related disease [and] Eleanor was diagnosed with mesothelioma in 2000."[58] Eleanor "died shortly thereafter in 2001."[59] After her death, "Anthony filed a wrongful death action on behalf of his deceased wife, and a survival action on his own behalf" against a number of defendants, the relevant defendant being Exxon Mobil, one of the companies "that owned the premises where the asbestos products were used and where Anthony worked."[60] Specifically, "[t]he complaint alleged that Eleanor contracted mesothelioma as a result of her continuous exposure to asbestos dust that was introduced into the home on Anthony's work clothes" and stated "that the premises owners, includ-

52. 895 A.2d 1143 (N.J. 2006). For a further discussion on what the New Jersey Supreme Court clarified in *Schwartz*, see *infra* notes 69–104 and accompanying text.

53. *See* Schwartz v. Accuratus Corp., 139 A.3d 84, 90 (N.J. 2016) (holding duty of care articulated by court in *Olivo* "was not defined on the basis of [the spousal relationship]").

54. For a discussion of the facts of *Olivo*, see *infra* notes 55–65 and accompanying text. For a discussion of the holding of *Olivo*, see *infra* notes 66–71 and accompanying text.

55. *See Olivo*, 895 A.2d at 1146 (describing plaintiff's circumstances that gave rise to asbestos exposure).

56. *See id.* (describing Anthony's exposure to asbestos).

57. *Id.* (describing how plaintiff's exposure to asbestos led to wife's exposure). For a further discussion of how laundry can expose an individual to asbestos particles, see *supra* note 11 and accompanying text.

58. *See Olivo*, 895 A.2d at 1146 (describing plaintiff's and plaintiff's wife's illnesses).

59. *Id.* (explaining circumstances surrounding plaintiff's wife's death).

60. *See id.* (discussing plaintiff's allegations). The other defendants, for a total of thiry-two defendants, included the various "manufacturers and suppliers of asbestos products[,] as well as companies . . . that owned the premises where . . . [the plaintiff] worked." *See id.*

ing Exxon Mobil, breached their duty to maintain a safe working environment by failing to take appropriate measures to protect Anthony, and derivatively Eleanor, from exposure to asbestos, asbestos fibers, and asbestos dust."[61]

Exxon Mobil filed a motion for summary judgment.[62] Subsequently, "[t]he trial court granted the motion, finding that 'imposing an additional duty on a landowner for asbestos related injuries that occurred off of the premises would not be fair or just.'"[63] The plaintiffs appealed, and the appellate court reversed the decision, holding "that Exxon Mobil was 'in the best position to prevent the harm' and could easily have warned workers . . . of the risks of asbestos exposure" and how exposure to asbestos could have been detrimental to their health and their spouses' health.[64] Furthermore, it could have taken measures to keep the clothes on the premises, such as "providing changing rooms" that the workers could use before going home for the night.[65] The appellate division, however, made it clear that "its holding was limited to a duty owed to plaintiff's decedent-wife."[66]

B. *Explicating* Olivo*: The Holding and Reasoning of the Case*

On appeal, the New Jersey Supreme Court affirmed the appellate decision to deny summary judgment.[67] The majority found that Exxon Mo-

61. *Id.* at 1146 (noting plaintiffs attempted to prove that Exxon owed duty to plaintiffs and could have taken precautionary steps to help them).

62. *See id.* at 1146–47 (discussing procedure). "All [other] defendants except Exxon Mobil settled." *Id.* (discussing procedural posture of case).

63. *Id.* at 1147 (quoting trial court).

64. *See id.* (quoting appeals court).

65. *See id.* (citations omitted) (discussing possible precautions Exxon Mobil could have taken). The appellate division focused on foreseeability in its analysis, but it also considered "whether it was unfair to impose a duty of care on Exxon Mobil for [Eleanor's] injuries." *See id.*

66. *See id.* (noting trial court attempted to cut off liability). The appellate division made this clarification to ensure that its decision did not "expose Exxon Mobil to liability to any person harmed by coming into contact with Anthony and his work clothes." *See id.*

67. *See id.* at 1148 (affirming appellate division). In arriving at its holding, the supreme court stated that it does take foreseeability into account when analyzing duty; however, foreseeability alone is not a determination of duty. *See id.* at 1148 ("Once the ability to foresee harm to a particular individual has been established, however, considerations of fairness and policy govern whether the imposition of a duty is warranted." (citing Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc., 638 A.2d 1288, 1294 (1994))).

The factors that go into the consideration of whether imposing a duty is fair are "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *See id.* at 1149 (quoting Carvalho v. Toll Bros. & Devs., 675 A.2d 209, 212 (N.J. 1996)).

bil owed Eleanor a duty, even though she was a spouse, and that there were still questions and issues to litigate at trial.[68] The majority stated:

> In weighing and balancing the relationship of the parties, the nature of the risk and how relatively easy it would have been to provide warnings to workers such as Anthony about the handling of his clothing or to provide protective garments, we do not hesitate to impose a derivative duty on Exxon Mobil for injury to plaintiff's spouse caused by exposure to the asbestos he brought home on his work clothing.[69]

The court found the risk of injury was foreseeable because Exxon Mobil knew of the dangers of asbestos and was in the "best position" to take preventative measures to help alleviate the risk.[70]

However, like the appellate division, the New Jersey Supreme Court seemed to limit the scope of its decision by stating, "The duty we recognize in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her hus-

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68. *See id.* at 1151 ("Issues of fact remain as to whether asbestos exposure was a known risk incidental to the specific work Anthony was hired to perform at the Exxon Mobil site."); *see also id.* (explaining why summary judgment motion was not granted).

69. *Id.* at 1149–50 (conducting risk-benefit analysis of duty). The decision in *Olivo*, and this imposition of duty, received some negative treatment. *See* Ga. Pac., LLC v. Farrar, 69 A.3d 1028, 1039 (Md. 2013) (declining to follow imposition of duty to household members on premises owner). The *Georgia Pacific* court said:

> Determining the existence of a duty requires the weighing of policy considerations, among which are whether, in light of the relationship (or lack of relationship) between the party alleged to have the duty and the party to whom the duty is alleged to run, there is a feasible way of carrying out that duty and having some reason to believe that a warning will be effective. To impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect would be poor public policy indeed.

Id.

70. *See Olivo*, 896 A.2d at 1147 (stating Exxon Mobil was in best position to prevent harm); *see also id.* at 1151 (noting Exxon Mobil had duty to plaintiff if hazard-incident-to-work exception did not apply). The court referred to the material available to Exxon in explaining why Exxon should have known of the risks of asbestos, and therefore, why it should have foreseen the potential injuries. *See id.* at 1149. (stating that because of materials, Exxon had reason to foresee risk of injury). For example, Judge LaVecchia stated:

> [A] report prepared in 1937 specifically for the petroleum industry, detailed the hazards associated with "occupational dust," including asbestos particles, which was prevalent at petroleum plants. As early as 1916, industrial hygiene texts recommended that plant owners should provide workers with the opportunity to change in and out of work clothes to avoid bringing contaminants home on their clothes.

Id. (referencing materials available to Exxon Mobil). The court reasoned that, if these materials were available to Exxon, they either knew or should have known about the potential harm of asbestos. *See id.*

band."[71] The court made it clear that a duty should be imposed only insofar as it maintains justice and fairness.[72]

IV. EXPANDING ON *OLIVO*: THE NEW JERSEY SUPREME COURT TAKES UP A NEW TAKE-HOME TOXIC TORT LIABILITY QUESTION IN *SCHWARTZ V. ACCURATUS CORP.*

It was not until 2016, in *Schwartz v. Accuratus Corp.*,[73] that the New Jersey Supreme Court took up an issue in this area again.[74] The issue in *Schwartz* was whether "'the premises liability rule set forth in *Olivo* extend[s] beyond providing a duty of care to the spouse of a person exposed to toxic substances on the landowner's premises, and, if so, what are the limits on that liability rule and the associated scope of duty?'"[75] The case began in 2012 and was "[o]riginally filed in Pennsylvania state court," but it "was removed to the [U.S.] District Court for the Eastern District of Pennsylvania."[76]

The plaintiffs in the case were Brenda Ann and Paul Schwartz, who filed "claims of negligence, products liability, and strict liability" against Accuratus Ceramic Corporation, a ceramic facility where Paul worked for multiple years.[77] "Brenda was diagnosed with chronic beryllium disease" in September of 2012, which the plaintiffs believed was the result of Paul bringing home beryllium particles on his clothes from work.[78] The complaint alleged that "employees at Accuratus's facility were exposed to manufacturing processes that included the production, casting, cutting,

71. *See id.* at 1150 (attempting to limit scope of duty).

72. *See id.* at 1147 ("The inquiry has been summarized succinctly as one that 'turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'" (quoting Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1116 (1993))).

73. 139 A.3d 84 (N.J. 2016).

74. *See id.* at 85 (returning to question of duty in take-home toxic tort cases).

75. *Id.* at 86. (restating "question of law certified and submitted" by Third Circuit). The New Jersey Supreme Court took up the question at the request of the Third Circuit Court of Appeals. *See id.*

76. *See id.* at 87 (explaining procedural posture of case).

77. *See id.* at 86. Paul worked at Accuratus in 1978 and 1979 as a machinist at its facility in Washington, New Jersey. *See id.*

78. *See id.*; *see also Beryllium Disease*, CLEVELAND CLINIC, http://my.clevelandclinic.org/health/diseases_conditions/hic_Beryllium_Disease [https://perma.cc/NWH8-Q32J] (last visited Apr. 6, 2017). The Cleveland Clinic says:

> When a person begins to develop CBD [chronic beryllium disease], inflammation (swelling) occurs in the lungs because they are reacting to a foreign object. The lungs' typical response to the beryllium exposure is to develop collections of cells known as granulomas that may eventually cause scarring within the lungs. This scarring, in turn, reduces the lungs' ability to function. Over time, the inflammation response continues, and eventually symptoms may appear, including: [d]ifficulty breathing/shortness of breath[,] [w]eakness[,] [f]atigue[,] [l]oss of appetite[,] [w]eight loss, [j]oint pain, [c]ough [and] fever.

Id.

grinding, and cleaning of beryllium oxide ceramics and other materials containing beryllium."[79] The plaintiffs alleged that these manufacturing processes could cause beryllium particles to "become suspended in the air and [ ] [become] inhaled."[80] Furthermore, if a facility did not have proper hygiene or ventilation, the beryllium particles could settle on the clothes and shoes of the workers and could be "transported into employees' automobiles and homes."[81]

An important factor that makes the *Schwartz* case different than most other take-home toxic tort claims is that, at the time Brenda was exposed to the beryllium particles from Paul's clothes, Paul and Brenda were not married.[82] Furthermore, Brenda was not even living with Paul, although she often stayed overnight and "performed laundry and other chores."[83] The fact that Brenda and Paul were neither married at the time of exposure nor were they related created an issue that had not been decided by any court.[84]

The plaintiffs moved to remand back to state court, but the motion was denied.[85] Eventually, the court granted the defendants' motion to

79. *See Schwartz*, 139 A.3d at 86 (discussing plaintiffs' allegations regarding exposure to beryllium particles).

80. *See id.* at 87 ("According to plaintiffs, in industrial settings, any action that disturbs the surface layer of beryllium will produce particles that become suspended in the air and can be inhaled."); *see also id.* (discussing complaint, which alleged beryllium particles can easily "spread throughout [work] facility," attach to clothes, and travel home with employees on clothing).

81. *See id.* ("[P]laintiffs maintain that studies show that, once a home environment is contaminated with beryllium, ordinary household chores such as vacuuming and dusting can re-suspend beryllium particles, causing persons in the home to be repeatedly exposed to beryllium.").

82. *See id.* at 86 (noting Paul's exposure to berrylium began prior to marriage with Brenda).

83. *See id.* (discussing chores performed by Brenda that led to exposure).

84. *See id.* (noting Paul's employment preceded his marriage to Brenda). Other jurisdictions have gone so far as to extend the duty only to spouses or other members of the family. *See, e.g.*, Gillen v. Boeing Co., 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014) (holding that although individual may be foreseeable plaintiff, "the specter of limitless liability . . . weighs heavily against this Court imposing such a duty" on that individual (citing Althaus v. Cohen, 756 A.2d 116, 1168–69 (Pa. 2000))).

85. *See Schwartz*, 139 A.3d at 87. In denying the remand, the federal court noted that neither New Jersey nor Pennsylvania "has recognized the duty of a [landowner or] employer to protect a worker's non-spouse . . . [or] roommate." *See id.* Later, the court denied the plaintiff's motion for reconsideration, stating "that to interpret *Olivo* as supporting a duty to Brenda would 'stretch the New Jersey Supreme Court's decision . . . beyond its tensile strength.'" *See id.* (quoting federal district court).

> The court added, concerning whether Altemose's employment could supply a liability link between Brenda and Accuratus, that "it is hard to imagine where the foreseeability link could ever be severed" if "New Jersey law [were to] find a foreseeable duty owed by an employee . . . to another employee's non-spouse visitor/co-habitant."

Id. (alteration in original).

dismiss.[86] In granting the motion, "[t]he court concluded as a matter of law that Brenda was not owed a duty of care by Accuratus."[87] After another year of additional procedural filings, the plaintiffs filed a notice of appeal with the Third Circuit, which in turn filed a "Petition for Certification of a Question of State Law" with the New Jersey Supreme Court.[88]

V. LOOKING PAST FORESEEABILITY: OUTLINING THE NEW JERSEY SUPREME COURT'S DECISION IN *SCHWARTZ V. ACCURATUS CORP.*

The answer to the proposed question of duty seemed to be an obvious one to the New Jersey Supreme Court.[89] The holding of *Schwartz* was not a novel or outlandish holding, but rather, was an expansion of the rule determined in *Olivo*.[90] The high court found that the duty of care it recognized in *Olivo* was not meant to "remain static."[91] The court explained that the establishment of duty in *Olivo* was not based on the spousal relationship between Eleanor and Anthony, but was instead based on it being "foreseeable that [Eleanor] would handle and launder her husband's soiled and contaminated clothes."[92] The court recognized the importance of adaptability in the common law "when appropriate to accommodate new expectations and ideas" as societal values and public policy evolve.[93] In deciding *Schwartz*, the court declined to establish a "bright-line rule" for determining whether there is a duty in take-home toxic tort liability cases.[94] It did not base its analysis on "the types of toxins" involved in the case, "nor . . . attempt to ascertain the class of individuals to whom a

86. *See id.* (noting court found Accuratus could not be expected to foresee Brenda would marry employee).

87. *See id.*

88. *See id.*; *see also* Schwartz v. Accuratus Corp., 118 A.3d 347, 347 (N.J. 2015) (accepting question certified by Third Circuit).

89. *See Schwartz*, 139 A.3d at 90 (stating that "*Olivo* [did] not suggest that the duty recognized must remain static for all future cases").

90. *See id.* ("In *Olivo*, our [c]ourt was acting in its traditional role as a court of common law, and one of the common law's 'great virtue[s]' is that it is dynamic, adaptable, and can evolve to accommodate changes in society." (alteration in original) (quoting State v. Culver, 129 A.2d 715 (N.J. 1957), *cert. denied*, 354 U.S. 925 (1957))).

91. *See id.* (expanding decision in *Olivo*). The court explained that the decision in *Olivo* was only the court's response to a question before it. *See id.* The court explained that *Olivo* never "state[d] . . . that a duty of care for take-home toxic-tort liability *cannot* extend beyond a spouse" and further noted that the court never "base[d] liability" on a biological or familial relationship. *See id.* at 91.

92. *See id.* at 90 (stating that liability of Exxon in *Olivo* was based on foreseeability, not spousal relationship).

93. *See id.* (citing Kelly v. Gwinnell, 476 A.2d 1219, 1226 (N.J. 1984)). The New Jersey Supreme Court has continuously emphasized the need for judicial involvement in determining tort liability. *See id.*

94. *See id.* at 91, 92 ("[W]e cannot define the contours of the duty owed to others in a take-home toxic tort action through a certified question of law.").

duty of care should extend."[95] Instead, the court broadened the issue of duty and explained that the question of duty is very fact-specific, and it should be decided using a "case-by-case assessment," analyzing "risk, foreseeability, and fairness."[96]

The court noted that the first factor to be addressed in a duty analysis is foreseeability; however, it is not the only factor.[97] The court stated, after determining whether the injury is foreseeable, that "considerations of fairness and policy" must play a role in the duty inquiry, as well.[98] The court then outlined a number of additional factors that courts should take into account when analyzing duty in take-home toxic tort cases.[99]

The first factor the court addressed was the relationship of the parties.[100] This relationship analysis would assess

> not only [ ] the relationship between a defendant's employee and the person who is exposed to the take-home toxin, but also the relationship between the defendant itself and the injured person, in determining whether it would be foreseeable, predictable, and just to find that the defendant owed a duty of care to that injured person or class of individuals.[101]

The second factor the court outlined was the "opportunity for exposure to the dangerous substance and the nature of the exposure that causes the risk of injury."[102]

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95. Albert L. Piccerilli, *New Jersey Supreme Court Extends Take-Home Exposure Rule*, MONTGOMERY MCCRACKEN: ALERTS & RESOURCES (July 18, 2016), http://www.mmwr.com/alert-resource/new-jersey-supreme-court-extends-take-home-exposure-rule/ [https://perma.cc/VXY2-9VD8] (explaining decision in *Schwartz*).

96. *See Schwartz*, 139 A.3d at 91 ("'[T]he anaylsis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.'" (quoting Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1116 (N.J. 1993))).

97. *See id.* at 88 (quoting Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1148 (N.J. 2006)) (stating duty of care question for take-home toxic tort liability "devolves to a question of foreseeability").

98. *See id.* (quoting *Olivo*, 895 A.2d at 1143).

99. *See id.* (determining most important aspects of duty).

100. *See id.* (explaining relationship is "relevant and weighty" to duty anaylsis (citing *Hopkins*, 625 A.2d at 1110)). Some jurisdictions have rejected duty altogether based on a lack of relationship between the employer and the affected party. *See id.* (citing Zimko v. Am. Cyanamid, 905 So. 2d 465, 483 (La. Ct. App. 2005)) (noting no precedent from "non-strict liability jurisdiction" has found duty outside of factual setting involving household members). The New Jersey Supreme Court stated that a relationship is not dispositive of duty, but that it is certainly a relevant factor. *See id.* (explaining that presence of relationship can help determine whether injury was foreseeable).

101. *Id.* (explaining how to consider relationship factor).

102. *See id.* at 91–92. (discussing factors in analyzing duty). For example, in a case where the employee is more directly exposed to the harmful substance, such as the employee in *Chaisson* who scraped asbestos insulation off pipes, the exposure to third parties might be more foreseeable. *See* Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 183 (noting employee's clothes were often dusty after work).

The third factor the court discussed involved "tak[ing] into account the employer's knowledge of the dangerousness of exposure, assessed at the time when the exposure to the individual occurred and not later, when greater information may become available."[103] Finally, the court discussed "the dangerousness of the toxin, how it causes injury, and the reasonable precautions to protect against [it]."[104] The court concluded that, after weighing these factors, it could apply "the duty of care recognized in *Olivo*," the duty of care employers owed to their employees' spouses, "to a plaintiff who is not a spouse."[105]

VI. BRINGING IT ALL TOGETHER: WHAT DOES THE NEW JERSEY SUPREME COURT'S DECISION IN *SCHWARTZ* MEAN?

The court's decision in *Schwartz* is the first of its kind in that no other jurisdiction has extended the duty of employers past their employees' spouses or immediate family members.[106] The court in *Schwartz* sup-

103. *See Schwartz*, 139 A.3d at 92; *see also* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (holding defendant not liable because exposure happened before risks of asbestos were widely known); Bobo v. Tenn. Valley Auth., 138 F. Supp. 3d 1285, 1298 (N.D. Ala. 2015) (concluding "[t]he foreseeability of the harm . . . was evident from the very nature of the relevant OSHA regulations and [the company's] internal standards").

The *Bobo* court found that the OSHA regulations promulgated in 1970 and the Tennessee Valley Authority's (TVA) own internal safety regulations were put into place with "the goal of preventing asbestos fibers from clinging to an employee's street clothes." *See id.* at 1309 (recognizing that regulations mandated "two lockers for each employee . . . separate changing facilities, and showers for [ ] employees"). The court found that if the TVA took these steps to prevent the harm of toxins attaching to its employees' clothes, then the risk of injury was foreseeable. *See id.* The court then found that if the risk of injury was foreseeable, TVA owed a duty to its employee's wife. *See id.*

104. *See Schwartz*, 139 A.3d at 92. Asbestos, for example, is an extremely dangerous toxin. *See Asbestos*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/SLTC/asbestos/ [https://perma.cc/TLW5-GY95] (last visited Apr. 7, 2017) (explaining dangers of asbestos). The Occupational Safety and Health Administration (OSHA) has determined there is no safe level of asbestos exposure. *See id.* (explaining how OSHA has regulated asbestos). OSHA states:

> Every occupational exposure to asbestos can cause injury of disease; every occupational exposure to asbestos contributes to the risk of getting an asbestos related disease. Where there is exposure, employers are required to further protect workers by establishing regulated areas, controlling certain work practices and instituting engineering controls to reduce the airborne levels.

Id. (footnote omitted) (explaining OSHA's requirements for employers).

105. *See Schwartz*, 139 A.3d at 92 (holding duty of care "may . . . extend beyond a spouse of a worker"). The court cautioned that there are limitations to this duty, which it has recognized in previous cases. *See id.* (stating "chance contact with a worker transporting home a toxic substance from another's premises should not suffice to create a duty of care" (citing Estate of Desir *ex rel.* Estiverne v. Vertus, 69 A.3d 1247, 1262 (N.J. 2013))).

106. *See Schwartz*, 139 A.3d at 91 (citing Zimko v. Am. Cyanamid, 905 So. 2d 465, 483 (La. Ct. App. 2005)) (stating that no other "jurisdiction . . . has found a duty . . . outside of a factual setting involving household members").

ported its decision by asserting that the outcome of this case was in line with notions of "societal values and public policy," as well as fairness.[107] A discussion of these notions of public policy, societal values, and fairness can be determinative in deciding whether extending the duty of care in take-home toxic tort theory cases is something that all jurisdictions should do.[108]

A. *The Good: Policy Considerations in Favor of Extending Duty in Take-Home Toxic Tort Theory Liability*

Because employers have the opportunity and resources to prevent both the exposure to the harmful substances and the harm that results from the employers carrying the substances home after work, there is a compelling reason to impose a duty of care onto employers or premises owners.[109] Employers can prevent exposure by taking a number of different precautions; for example, employers can provide changing stations so employees can change their clothes after work, on-site laundry, work clothes such as overalls or coveralls that can be left at work at the end of the day, or showers or sanitation stations employees can use to clean themselves.[110] These precautions are neither overly burdensome nor expensive for employers or premises owners.[111] On the other hand, the risk of injury if these preventative measures are not taken is extremely high because the exposure to harmful substances can lead to severe illness or even death.[112] Because the burden of preventing the harm is relatively small

107. *See id.* at 90–91 (discussing *Olivo*).

108. For a further discussion of the considerations both in favor of and against extending duty in take-home toxic tort litigation, see *infra* notes 109–34 and accompanying text.

109. *See* Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1147 (N.J. 2006) (noting landownders and premises owners are in "the best position to prevent the harm" (quoting Olivo v. Exxon Mobil Corp., 872 A.2d 814 (N.J. Super. Ct. App. Div. 2005)). For a discussion of the reasoning in *Olivo*, see *supra* notes 67–72 and accompanying text.

110. *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 353 (Tenn. 2008) (stating possible precautions Alcoa could have taken to prevent harm); *see also* Simpkins v. CSX Corp., 929 N.E.2d 1257, 1265 (Ill. App. Ct. 2010) (alleging employer could have reduced risk of exposure by "substituting other products, providing warnings of the danger, providing safety instructions, testing the products, and requiring hygienic practices").

111. *See Simpkins* 929 N.E.2d at 1265 (finding that "burden of guarding against take-home asbestos exposure is not unduly burdensome when compared to the nature of risk to be protected against"); *see also* West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 551 (Tenn. 2005) ("This Court has held that a risk is unreasonable, 'if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.'" (quoting Burroughs v. Magee, 118 S.W.3d 323, 329 (Tenn. 2003))).

112. *See Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST., https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet#q3 [https://perma.cc/LQ2E-9X59] (last visited Apr. 7, 2017) (explaining that research suggests that exposure to asbestos can lead to "lung cancer and

compared to the gravity of the potential injuries, employers should be held liable when they do not take reasonable steps to ensure the safety of their employees and their employees' families.[113]

Another policy consideration that weighs in favor of extending duty in these cases is that employers are not only in the best position to know *how* to prevent the harm, but also to know *of* the harm.[114] Because all employers and premises owners have to follow safety regulations, such as the ones that OSHA promulgates, they already know how dangerous some of these substances are and have guidelines to help limit exposure.[115] Furthermore, employers often have their own safety regulations that they create based on their knowledge of the substances their employees will encounter.[116] Many courts recognize that access to this information, along with other information such as warnings from manufacturers, creates a duty to warn employees of the potential health risks of exposure.[117]

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mesothelioma . . . gastrointestinal and colorectal cancers," asbestosis, and other "permanent lung damage"); *see also Public Health Statement for Benzene*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Aug. 2007), https://www.atsdr.cdc.gov/phs/phs.asp?id=37&tid=14 [https://perma.cc/FZX2-DY8X] (noting exposure to benzene can lead to leukemia and other forms of cancer, as well as birth defects and other serious health risks).

113. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (detailing risk-benefit duty analysis); *see also id.* ("If the probability [of injury] be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B is less than PL.").

114. *See* Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 665 (1st Cir. 1999) (noting amount of access to information defendant had about benzene). In *Curtis*, the defendant employer arranged for an engineer to explain to them the dangers of benzene, to which their workers would be exposed:

> After his visit, [a senior engineer] promptly wrote a letter to M&S reiterating the dangers of benzene and identifying six safety items that M&S would have to complete before DuPont would deliver [heavy aromatic distillate (HAD)] to the refinery. These items included providing benzene awareness training to the operators and mechanics responsible for unloading and processing HAD; developing procedures for unloading and processing HAD; providing safety showers and eyewash facilities at the barge unloading area; making available and using proper protective equipment; providing employee benzene exposure monitoring; and providing temporary or permanent benzene warning signs.

Id. (explaining engineer's visit and information given to defendant).

115. *See Asbestos*, *supra* note 104 (showing guidelines regarding employee exposure to which employers have access); *see also* Chaisson v. Avondale Indus., Inc., 947 So.2d 171, 183–84 (La. Ct. App. 2005) (holding that because company was aware of 1972 OSHA standards regarding hazards of household asbestos exposure, it had duty to protect third-party household members from exposure at jobsite that it knew contained asbestos).

116. *See* Genereux v. Am. Beryillia Corp., 577 F.3d 350, 367 (1st Cir. 2009) (noting that "because of its concern about beryllium dust, [employer] created safety policies for opening packages containing beryllium and for sandblasting beryllium oxide ceramics").

117. *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 353 (Tenn. 2008). The court noted,

> Contrary to the OSHA regulations, Alcoa failed to educate Mr. Satterfield and its other employees regarding the risk of asbestos or how to handle

While employers generally know more about the substances their employees are working with, the employees might not know the extent of the harm of the substances they are working with, or even what substances they are working with.[118] Therefore, because employers have access to access to relevant information and safety regulations, even if the employers claim they did not foresee the dangers of take-home exposure, there is often enough evidence to prove that they should have foreseen the dangers.[119]

Additionally, there is a question of culpability in take-home toxic tort theory cases: If a spouse or roommate contracts a life-threatening disease

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> materials containing asbestos. Even though Alcoa's employees worked extensively with materials containing asbestos, these materials did not contain warning labels or notices stating that they contained asbestos. Despite the fact that Alcoa was aware of the dangers posed by asbestos before Mr. Satterfield became an employee, it failed to apprise him or its other employees of the dangers of asbestos or specifically of the danger associated with wearing home their asbestos-contaminated work clothes.

Id. at 352; *see also* Frieder v. Long Island R.R., 966 N.Y.S.2d 835, 839 (Sup. Ct. 2013) (holding that owners that have control over premises are ones who are best able to identify and know about use of harmful chemicals on their property, and therefore prevent harm). The Long Island Railroad was held liable because it "had exclusive control over the working conditions within the repair yard," as well as the employers. *See id.* (holding LIRR was in best position to know about use of asbestos).

118. *See* Anderson v. A.J. Friedman Supply Co., 3 A.3d 545, 550 (N.J. Super. Ct. 2010) (asserting plaintiff never knew he was exposed to asbestos at his job). In *Anderson*, "plaintiffs Bonnie and John Anderson, husband and wife, allege[d] that Bonnie contracted mesothelioma . . . . [via] bystander exposure from laundering [her husband]'s asbestos-laden work clothes during his employment with Exxon." *See id.* at 554. The discussion of the employee's job duties included that:

> He worked for many years as a chemical process operator repairing pumps and filters, which required initial removal of all covering insulation. Using chisels and hand tools, and sometimes his bare hands, he would pull the insulation off in chunks. Dust would fly everywhere. Exxon used insulation on all pumps, compressors, filters, and valves. He also would dump whole bags of raw insulation into the tanks to seal holes in the filters and would put that same material into coffee cans when he had to repair the filters by hand.

Id.

Bonnie would always wash his clothes and shake all the dust off of them. *See id.* The expert in the trial, a doctor specializing in "occupational and environmental medicine," testified that due to the unseen small asbestos fibers that become suspended in the air, often people do not know they have been exposed to asbestos, so they continue to work with it. *See id.* at 553 (asserting exposure to asbestos at job was most likely cause of mesothelioma).

119. *See* Zimko v. Am. Cyanamid, 905 So.2d 465, 466 (La. Ct. App. 2005) (holding defendant has general duty to act reasonably in view of foreseeable risks of danger to household members).

> [T]he plaintiff's evidence, which consisted of a 1951 federal statute imposing safety standards on private companies holding public contracts, supported the court's finding that the risk of injury was foreseeable because the statute identified the dangers of take-home exposure and directed employers to implement measures to protect against such exposure.

See Melancon, *supra* note 43, at 48 (discussing *Zimko*, *Chaisson*, and other cases).

as a result of the other spouse's employers' negligence, if the employer cannot be held liable, then who can be held liable?[120] It seems that, as a matter of fairness and public policy, the spouse should be entitled to some sort of relief and compensation.[121]

Lastly, there are additional policy considerations in favor of extending duty in take-home toxic tort theory cases that seem to boil down to common sense and fairness.[122] For example, rather than outright declining to extend duty to any employers, it would be more fair for courts to analyze duty on a case-by-case basis, considering several factors, as the New Jersey Supreme Court did in *Schwartz*.[123] After careful and thorough analysis, courts could balance the relief entitled to the plaintiffs exposed to the harmful chemicals with the liability of defendants.[124] Additionally, imposing a duty on employers would be in the public interest because it would hold employers accountable and force them to take further precautions in protecting their employees and the public from exposure to harmful chemicals.[125]

B. *The Bad: Policy Considerations Against Extending Duty in Take-Home Toxic Tort Theory Cases*

Conversely, there are jurisdictions that have recognized and noted some of the negative policy considerations that would result from extending duty in take-home toxic tort cases.[126] Many courts that have declined to extend duty have found issue with using foreseeability as the

120. For further discussion of causation and culpability issue in take-home toxic tort theory litigation, see *supra* notes 28–40 and accompanying text.

121. *See* L. Neal Ellis, Jr., *Introduction*, *in* ELEMENTS OF TOXIC TORT LITIGATION 3, 6 (Arthur F. Foerster & Christine Gregorski Rolph eds., AM. BAR ASS'N 2d ed. 2013), http://apps.americanbar.org/abastore/products/books/abstracts/5350245_chap1_abs.pdf [https://perma.cc/Q79X-YFWM] (discussing how toxic tort litigation is continuing to expand, grow, and adapt, and how it now encompasses various claims and potential damages).

122. For a further discussion of relevant policy considerations, see *infra* notes 123–25 and accompanying text.

123. *See* Schwartz v. Accuratus Corp., 139 A.3d 84, 91 (N.J. 2016) (reasoning that courts should analyze foreseeability before considering other factors).

124. *See* Chaisson v. Avondale Indus., Inc., 947 So.2d 171, 183 (La. Ct. App. 2005) (holding that "the possibility of limitless liability is of no concern because finding a duty in this case would not create a categorical duty rule, but one based upon the facts and circumstances of this case").

125. *See id.* at 183–84 ("[T]he historical precedent and development of institutional guidelines show that courts are holding companies liable for negligence based on unsafe work conditions. This desire for accountability is also shown in the strengthening of OSHA regulations to allow for minimal asbestos exposure to workers and none to household members.").

126. For a discussion of the different reasons why courts have decided not to extend duty in toxic tort liability cases, see *supra* notes 44–48 and accompanying text.

primary, if not only, consideration in a duty analysis.[127] One of the most recognized and discussed issues in these cases is the idea that, despite the fact that these third parties are potentially foreseeable, extending duty in take-home toxic tort litigation cases may create "limitless liability" on the part of the employers and premises owners.[128] Jurisdictions that have recognized and expressed this concern have struggled with determining

127. *See* Gillen v. Boeing Co., 40 F. Supp. 3d 534, 540 (E.D. Pa. 2014) (noting Pennsylvania courts weigh number of different factors in determining duty). In *Gillen*, the plaintiff "developed mesothelioma as a result of direct exposure to asbestos . . . . [from] work[ing] as a secretary at the Boeing Vertol facility," and exposure as a result of doing laundry for her husband, "[who] also worked at Boeing Vertol facility." *Id.* at 536. The husband was a machinist at the facility and worked with many asbestos products and materials. *See id.* at 536. The district court in *Gillen* explained that Pennsylvania law illustrates that foreseeability alone is not *determinative* in a duty analysis. *See* id. at 542. (stating that "foreseeability is only one of five distinct factors [the] court must consider"). The factors Pennsylvania courts apply in a duty analysis are "'(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.'" *Id.* at 538 (quoting Althaus v. Cohen, 756 A.2d 1166, 1168–69 (Pa. 2000)); *see also* Bootenhoff v. Hormel Foods Corp., No. CIV-11-1368-D, 2014 WL 3810383, at *3, *6 (W.D. Okla. Aug. 1, 2014) (quoting Lowery v. Echostar Satellite Corp., 160 P.3d 959, 963 (Okla. 2007)). The district court in Oklahoma highlighted five policy factors to be considered in duty analysis in addition to foreseeability: "(1) the degree of certainty of harm to the plaintiff; (2) moral blame attached to the defendant's conduct; (3) need to prevent future harm; (4) extent of the burden to the defendant and consequences to the community of imposing the duty on the defendant; and (5) availability of insurance for the risk involved." *Id.* (citing *Lowery*, 160 P.3d at 964 n.4) (holding after considering policy factors, defendants did not owe duty of care to plaintiff).

128. *See In re* Asbestos Litig., No. 04C-07-099-ASB, 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007) (holding extension of duty would expose defendant to "practically limitless" liability). The Delaware Superior Court in *In re Asbestos Litigation* found that "[t]he burden upon the defendant to undertake to warn or otherwise protect every potentially foreseeable" person from potential exposure would be "simply too great." *See id.* (holding defendant not liable); *see also In re* Certified Question from Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 219 (Mich. 2007) (highlighting seriousness of asbestos litigation crisis).

> Premises owner liability for "take home" exposure injuries represents the latest frontier in asbestos litigation. These actions clearly involve highly sympathetic plaintiffs. Yet, as several leading courts have appreciated, the law should not be driven by emotion or mere foreseeability. Broader public policy impacts must be considered, including the very real possibility that imposition of an expansive new duty on premises owners for off-site exposures would exacerbate the current "asbestos-litigation crisis." Plaintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes . . . .

Id. at 219 (quoting Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21 MEALEY'S LITIG. REP. ASBESTOS 1, 4 (2006)) (internal quotation marks omitted) (stating "scores of employers have been forced into bankruptcy" due to asbestos litigation).

where to draw the line when it comes to duty.[129] If duty extends to a wife who comes into contact with an employee's clothes, what reason would there be not to extend the duty to everyone who comes into contact with the employee's clothes?[130]

Moreover, many courts maintain that it is not foreseeable that third parties will be harmed by substances brought home on the clothes of employees.[131] If the harm is not foreseeable, it is unfair and unjust to impose a duty of care of employers.[132] These same courts maintain that, as a matter of fairness, employers should be liable only to those who are injured on their premises.[133] Lastly, these courts argue that adopting the analysis set

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129. *See* Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 630 (Pa. 1999). Yes, one can reason in so many instances that an extension of liability is merely a small step flowing naturally and logically from the existing case law. Yet each seemingly small step, over time, leads to an ever proliferating number of small steps that add up to huge leaps in terms of extension of liability. At some point it must stop . . . .

Id. (quoting Emerich v. Phila. Ctr. for Human Dev., Inc., 720 A.2d 1032, 1045 (Pa. 1998)).

130. *See Gillen*, 40 F. Supp. 3d at 541 (stating extending duty would be contrary to public interest). The district court in *Gillen* found that imposing a duty in take-home exposure cases would create infinite liability. *See id.* at 540 ("As other courts have recognized, without a limiting principle, liability for take-home exposure would essentially be infinite. Therefore if Boeing owed Mrs. Gillen a duty, it would similarly be said to owe a duty to children, babysitters, neighbors, dry cleaners, or any other person who potentially came in contact with Mr. Gillen's clothes." (citation omitted) (citing *In re Asbestos Litig.*, 2007 WL 4571196, at *12)).

131. *See* Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 462 (Tex. Ct. App. 2007) (holding that because exposure occurred in 1950s when dangers of asbestos danger were less known, employer "neither kn[ew] nor [could have] reasonably foresee[n]" that asbestos dust on workers clothes could harm household members); *see also* Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844, 846 (10th Cir. 1992) (holding that under Oklahoma law, manufacturer's "duty to warn" of dangers extended only to "ordinary consumers" and not to employee's wife).

132. *See In re* Asbestos Litig., 2007 WL 4571196, at *8 ("[W]here the harm is not foreseeable, no duty can be imposed, but where the harm is foreseeable, other factors must be considered to determine whether a duty should be imposed."). Many courts and scholars held that using foreseeability as the sole determination of duty is problematic. *See id.* at *10 (stating duty and foreseeability are not interchangeable); *see also* Holdampf v. A.C. & S., Inc. (*In re* N.Y.C. Asbestos Litig.), 840 N.E.2d 115, 199 (N.Y. 2001) ("[F]oreseeability alone does not define duty—it merely determines the scope of the duty once it is determined to exist." (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001)) (internal quotation marks omitted)); W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 740 (2005) ("[B]ecause duty is the sole element of negligence not left in the first instance to the jury, duty—and hence, foreseeability—has become the primary source of judicial power to weed out cases deemed by a judge to be unworthy."); *see id.* (arguing foreseeability should be question for jury).

133. *See* Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (1998) (holding no duty was owed to person who had never set foot on employer's premises). Ohio and Kansas have both implemented statutes that eliminate any liability for premises owners for exposures that take place away from their premises. *See* KAN. STAT. ANN. § 60-4905(a) (West 2017) (ordering that premises owner may not be held liable for any injury due to exposure unless injury occurred on premises); *see also*

forth in *Schwartz* would require a lengthy and complex analysis of duty every time there is a toxic tort case, when these issues may be more appropriate for a jury.[134]

VII. WRAPPING UP: WHERE DOES *SCHWARTZ* LEAVE TAKE-HOME TOXIC TORT THEORY LIABILITY?

The analysis set forth in *Schwartz* offers a useful balance between the negative and the positive policy considerations in determining liability for take-home toxic torts.[135] An extension of duty does not create limitless liability because the duty is not extended to anyone who comes into random contact with the employee—it is just extended to those who live with the employee or those who are essentially household members.[136] Furthermore, the analysis does not determine duty based solely on foreseeability; it takes a number of factors into consideration, assuring a degree of fairness.[137] Lastly, the analysis provides relief to the plaintiff and places liability in the hands of the person who is in the best position to prevent the harm and to pay for the damages.[138]

Adams v. Goodyear Tire & Rubber Co., No. 91404, 2009 WL 280398, at *2 (Ohio Ct. App. Feb. 5, 2009) (holding statute precluded plaintiff from succeeding). The relevant Ohio statute states:

> (A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:
>
> (1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

OHIO REV. CODE ANN. § 2307.941 (West 2016).

134. *See* Kotlarsky, *supra* note 40, at 488 (asserting duty analysis courts have taken on in toxic tort theory litigation is lengthy and unnecessary). Kotlarsky states:

> In courts' efforts either to impose a duty or deny a duty in take-home asbestos cases, they have engaged in unclear analyses and set bad precedents for future cases. Courts that find that a duty existed rely on fact-specific inquiries like foreseeability that usurp the role of the jury, while courts that deny duty hide their policy determinations behind legal doctrines like nonfeasance and a lack of relationship between the parties.

Id.

135. For a further discussion of the decision in *Schwartz*, see *supra* notes 90–96 and accompanying text.

136. For further discussion of limitless liability, see *supra* notes 124 and 128 and accompanying text. The New Jersey Supreme Court has stated that the extension of duty will not create limitless liability because the duty is "focused on the particularized foreseeability of harm" of the person in the circumstances. *See* Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1150 (N.J. 2006) (holding Exxon's fear of "limitless exposure" to be unfounded in circumstances).

137. For a further discussion of the importance of considering other factors besides foreseeability in determining duty of care, see *supra* note 127 and accompanying text.

138. For a discussion of why employers are in the best position to prevent harm and take precautions, see *supra* notes 109–11 and accompanying text.

However, if other jurisdictions were to adopt the *Schwartz* holding, litigation would greatly increase in the area of law that already features the longest running mass tort litigation.[139] It will allow more injured plaintiffs to bring claims against not only their spouses' employers, but also manufacturers and premises owners because they have a similar duty.[140] Second, it will lead to a more complex and lengthy analysis of duty.[141] The necessity of weighing the factors set forth in *Schwartz* before making a determination of duty will result in a reduced number of early dismissals in take-home toxic tort cases, allow for wider discretion within these decisions, and, perhaps, lead to discrepancies between courts.[142]

The New Jersey Supreme Court's decisions in *Olivo* and *Schwartz* could influence the decision of other jurisdictions deciding the same issue; in fact, there are a number of different jurisdictions that have similar cases pending.[143] The California Supreme Court heard arguments in September of 2016 on this exact issue and made a decision in December of

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139. *See* Suna Lee, *NJ Supreme Court Opens Door to More Take-Home Exposure Claims Against Landowners*, WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP (Aug. 1, 2016), http://www.wilsonelser.com/news_and_insights/client_alerts/2682-nj_supreme_court_opens_door_to_more_take-home [https://perma.cc/NT3U-HTGU] (outlining effects of *Schwartz*). Because of the decision in *Schwartz*, it will be more difficult for defendants to convince courts to grant "early dismissals of claims filed by non-spouses." *See id.*

Because "liability to a non-spouse is . . . [now] a fact question for which discovery is needed," defendants cannot move to dismiss cases "based upon marital status alone." *Id.* Furthermore, due to the lengthy and complicated duty analysis, courts may be inclined to grant summary judgment motions less often. *See id.*

140. *See* Tom Johnson, *State's High Court Lays Down New Law on Liability For Toxic Exposure*, NJ SPOTLIGHT (July 7, 2016), http://www.njspotlight.com/stories/16/07/06/state-s-high-court-lays-down-new-law-on-liability-for-toxic-exposure/ [https://perma.cc/UMP4-2F46] (asserting New Jersey Supreme Court's decision in *Schwartz* will open up door to litigation and "increase liability" in take-home toxic tort cases).

141. For further details of the more lengthy and complicated duty analysis, including the factors analyzed, see *supra* notes 123–27 and accompanying text.

142. *See* Peter Hayes, *Fewer Early Dismissals Predicted for New Jersey Toxic Take Home Suits*, BLOOMBERG BNA TOXICS L. REP. (July 14, 2016), https://www.tuckerellis.com/userfiles/file/Accuratus_7_7_16.pdf [https://perma.cc/QNY7-X8DF] (predicting extension of liability will lead to fewer summary judgment motions being granted).

143. *See* Howard Fischer, *Court: Arizona Companies Not Liable for Asbestos Taken Home on Clothing*, TUSCON.COM, (Sept. 20, 2016), http://tucson.com/business/tucson/court-arizona-companies-not-liable-for-asbestos-taken-home-on/article_ea192512-308b-5770-80cf-3997a4ec121f.html [https://perma.cc/332W-4VPM] (detailing new decision in take-home toxic tort litigation from Arizona Court of Appeals). The Arizona Court of Appeals ruled in September of 2016 that "companies have no duty to protect family members from exposure to toxic materials their employees bring home on their work clothes." *See id.* The court reasoned that making companies responsible for injuries that were the result of second-hand exposure to chemical or toxic products would "open the door for claims by people who came into contact with asbestos-tainted clothing in a taxicab, grocery store, dry cleaner, convenience store or laundromat." *See id.*

2016.[144] Following in the footsteps of the New Jersey Supreme Court, the California Supreme Court held that the duty of employers to "prevent take-home exposure" extends not only to employees, but members of the employee's household, regardless of their relationship.[145] How other jurisdictions will rule and the future of this issue is unclear, but we do know one thing for sure: laundry has become a bit more dangerous than we thought.

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144. *See* Kesner v. Superior Court, 226 Cal. App. 4th 251, 261 (Ct. App. 2014) (holding manufacturer owed duty of care to employee's nephew to avoid harm from secondary exposure to asbestos), *vacated*, 384 P.3d 283 (Cal. 2016). The California Court of Appeals held:

> In concluding that Abex's duty of care extends to Kesner, a long-term guest in the home of Abex's employee, we emphasize that our ruling is based on the assumption, required by the standard for reviewing the sufficiency of the allegations of a complaint, that Kesner's contact with his uncle was extensive. As to such persons, the foreseeability of harm is substantial. As to persons whose contact with an employer's worker is only casual or incidental, the foreseeability of harm and the closeness of the connection between the defendant's conduct and the plaintiff's injury may be so minimal . . . .

Id. (holding there is duty because harm was foreseeable); *see also* Haver v. BNSF Ry. Co., 172 Cal.Rptr.3d 771 (Cal Ct. App., 2014) (holding employer lacked duty not to expose employee's wife to asbestos), *rev'd*, *Kesner*, 384 P.3d 283.

145. *See* Kesner v. Superior Court, 384 P.3d 283, 305 (Cal. 2016). The California Supreme Court stated:

> We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission . . . . Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs.

Id. at 288 (holding employer has duty to employee's household members because injury is foreseeable).